

Employment & Industrial Case Note

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TERMINATION OF EMPLOYMENT – WHETHER AN EMPLOYEE EMPLOYED UNDER AWARD – DERIVED CONDITIONS

Carl Nottage and National Australia Bank Limited (U 2007/4360) [2008] AIRC 5

This is an interesting decision given that it involves a fairly senior employee employed under a contract seeking to come within the jurisdiction of the Australian Industrial Relations Commission. The employer, the National Australia Bank, of course employs more than 100 employees, but the difficulty for Mr Nottage is that he was employed under a contract at a fairly substantial remuneration and at a fairly high level (relatively) within the bank. The only way that he could fall within the jurisdiction of the Commission concerning his termination of employment is if he could show that he was employed under Award Derived Conditions. See in particular subsection 642(6) of the Act.

At the time of termination, Mr Nottage's remuneration had reached just over \$156,000.00 per annum.

There was no dispute that the employer bank was bound in relation to his conditions of employment by a Workplace Agreement or an Award. The question that needed to be determined was: *Whether the bank was also bound in relation to Mr Nottage's wages by an Award or Workplace Agreement or an APCS.* The instruments in question were the National Australia Bank Group Award 2002 and the NAB Enterprise Agreement. Therefore, the Commission had to look at whether the bank was bound in relation to the employee's wages by the Award provisions incorporated into the Agreement.

The documents of the bank revealed that there was a classification level or salary grade for the employee and that was at Grade "D".

The Commissioner agreed with a submission on behalf of the employee that: *It is clear from the evidence that the Grades referred to in the Award relate to the classification structure adopted by the respondent.* The Commission also found that this was made clear by the Agreement in question. Therefore, the Commission found the employer's position was graded "D" for the purposes of the Award and the Enterprise Agreement.

Consistent with the scheme in the Award, there was nothing in the Agreement that directly set wage rates for the classification level for which the employee was working. The Agreement set minimum rates of pay only for certain grades, being "O" to "G" and the Agreement provided the intent was or is *to set out the minimum, safety net rates for each classification, grade or group, as appropriate and to protect allowances.* The Commission found that: *The parties to the Agreement chose not to set minimum pay rates applying above Grade G.*

Importantly in assessing employment under Award Derived Conditions, the Commissioner turned to the interpretation of those terms and in particular a decision of the Full Bench of the Commission in *Deane v Paper Australia Pty Ltd* [PR 929820]. The Full Bench said: *On the ordinary meaning of the words used there must be regulation of both wages and conditions of employment.* Similar words were used in the explanatory memorandum for the current legislation. The Commissioner therefore found that the current test is intended not to be materially different from the previous test, in that the Agreement must regulate both wages and conditions of employment.

The Commissioner went on to find that *consistent with the decision in Deane v Paper Australia Pty Ltd in my view Mr Nottage was not in a classification whose wages were regulated by the Award or the Agreement.*

COMMENT

The Commissioner found that the employee in this case was not employed under Award Derived Conditions and that his employment was governed by the contract that he signed. In assessing applications in the AIRC, being whether before or after they are made, then reference must be had to the documents that govern or could govern the employment of the employee. It will not be irregular that a contracted employee will assess his or her rights in the Industrial Commission and that assessment, from an employer's perspective, must be assessed particularly when the employment contract is drawn and at time of termination, if termination is being considered, assessing what steps the employee may take. Employers should be very careful therefore to draw the employment contracts correctly, bearing in mind what other industrial instruments could govern the employee's employment terms. The important point from the current Act is that it has been confirmed that being employed under Award Derived Conditions means there must be regulation of both wages and conditions of employment.

For all your enquiries or legal needs concerning drawing of contracts and assessments of terms of engagement and considerations of termination of employment, please do not hesitate to contact our Employment and Industrial Team.

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